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No. 86-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

SAM RICHARDSON, JR., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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Respondents do not deny that the issues in this case involve important aspects of federal judicial administration regarding the application of collateral estoppel. Respondents in their opposing brief do not answer the petition for writ of certiorari but merely echo the creative — and erroneous — conclusions of the majority panel of the Eighth Circuit.

The Eighth Circuit has ordered the parties to relitigate in federal court issues previously presented to and fully and fairly adjudicated by the Arkansas Oil and Gas Commission (the State Commission). The Eighth Circuit's rationale for failing to accord the State Commission adjudication preclusive effect was that the state tribunal had no authority to award respondents money damages *in the*

event it found they had been injured by petitioner.[1] This myopic focus on the State Commission's lack of authority to award money damages (*i.e.*, the remedy now sought by respondents) blinded the Eighth Circuit from seeing that the state tribunal was empowered to, and did, decide the core factual issue.

Respondents assert that petitioner inaccurately characterized the Eighth Circuit's rationale for its holding; they claim the State Commission did not fully and fairly adjudicate the factual issue of whether they suffered injury from petitioner's operations. The record belies respondents' assertions. An examination of the 980 page transcript of the 1979 State Commission proceeding, respondents' application for that proceeding (Petition, App. H, p. 43a), the 1979 State Commission Order (Petition, App. G, p. 33a), and the state court judgment affirming that order (Petition, App. F, p. 31a) shows that the core factual issue considered and determined by the State Commission was whether petitioner's operations injured or *even threatened to injure* respondents. The State Commission found neither injury nor threat of injury.

The Eighth Circuit's emphasis on remedy, rather than on the core factual issue the parties admittedly litigated and the State Commission adjudicated, shifts the focus in

[1]The Eighth Circuit also rationalized that the State Commission decision was not entitled to preclusive effect in respondents' tort action because the burden of proof in the tort suit differs from the burden respondents faced in the administrative proceeding. The burdens of proof in the two proceedings do differ sharply. Contrary to the Eighth Circuit's conclusion, however, respondents face a greater burden of proof in their tort suit. To prevail in the tort action, respondents must show they have been wrongfully injured by petitioner; to prevail before the State Commission, respondents only had to show that petitioner's operations *threatened them with harm*. Petition, App. G, p. 39a and 40a (Commission finding of fact number 5 and conclusion of law number 3).

issue preclusion determination from what has been litigated previously to what has not been litigated.[2]

Consider how the Eighth Circuit's rationale would be applied in a classic tort context. Recovery in tort actions requires proof that a defendant owed plaintiff a duty, that defendant breached the duty, that plaintiff suffered injury and that the injury was proximately and factually caused by defendant. A plaintiff whose tort action has been defeated because he could not present proof of the first of those elements is not, and should not, be entitled to bring a second lawsuit on the ground that injury or proximate cause had not been fully and fairly litigated in the first action. The Eighth Circuit's erroneous decision, focused as it is on the fact that the "issue" of remedy was not fully considered by the State Commission, would require that the second lawsuit be tried.[3] Such a result is absurd. Carried to its logical conclusion, the decision of the Eighth Circuit nullifies the defensive use of the doctrine of collateral estoppel. To allow the Eighth Circuit opinion to stand unreviewed diminishes the force of this Court's rulings concerning the preclusive effect of state administrative adjudications.

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[2]In their Amended Complaint, respondents *themselves* conceded that the factual issues in their tort action for money damages are identical to the questions necessarily decided adverse to them by the State Commission. Petition, App. D, p. 23a. Inexplicably and erroneously, the Eighth Circuit majority chose to ignore respondents' judicial admission. Now respondents in their opposing brief weakly, *and for the first time,* attempt to explain away the consequences of their admission. Brief in Opposition, p. 13, n. 1.

[3]In a true legal sense the remedy aspect — whether in the form of money damages or otherwise — *was litigated* by the State Commission. The State Commission found that respondents had proved neither injury nor the threat of injury; thus, the question of remedy — in any form — was rendered moot.

In addition, it should be noted that respondents, while acknowledging that strong federal interests in judicial efficiency and finality are promoted by a liberal application of issue preclusion, make no attempt to answer petitioner's suggestion that those federal interests may override the *Erie* doctrine's requirement that federal courts sitting in diversity apply the forum state's law[4]. This is a recurring issue of national interest. The time is ripe for this Court to consider the desirability of adopting federal principles of issue preclusion.

Respectfully submitted,

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[4]This case does not involve claim preclusion. *Cf. Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327 (1985) (refusing to adopt federal rules of claim preclusion). Rather, this case concerns the preclusion that attaches after fundamental core factual issues have been fully and fairly litigated and determined.